DEC 27 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 598 AND 599

HARVARD STATE BANK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated December 21, 1940.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS OF COURTS BELOW

An opinion of the Special Court of three judges in the District Court of the United States for the District of Maryland, confirming the plan of adjustment of The Baltimore and Ohio Railroad Company (hereinafter called the B. & O.) is reported in 29 F. Supp. 608. A Decree in accordance with said opinion (hereinafter called the Decree) was entered on November 8, 1939, and a petition for a writ of certiorari for a review of the Decree was denied on January 29, 1940 (309 U. S. 654) and an application for a rehearing of the petition was denied on March 25, 1940 (309 U. S. 697).

An opinion of the Special Court construing the Decree is reported in 34 F. Supp. 154. Order No. 22 (R. 2-3) was entered by the Special Court in accordance with said opinion on August 3, 1940. The opinion of the Circuit Court of Appeals for the Fourth Circuit dismissing an appeal from the denial (Order No. 23, R. 12-13) of the Petitioner's motion to vacate Order No. 22 was rendered on November 12, 1940, and is contained in the Record at pages 17-24.

JURISDICTION

(a) Jurisdiction to review Order No. 23 of the Special Court.

The date of Order No. 23 sought to be reviewed herein is September 28, 1940 (R. 12).

The proceeding in the Special Court was under Chapter XV of the Bankruptcy Act (53 Stat. 1134, 11 U. S. C. §§ 1200-1255). The jurisdiction of this Court is invoked under Section 745 of Chapter XV.

(b) Jurisdiction to review order of Fourth Circuit.

The jurisdiction to review the order of the Circuit Court of Appeals for the Fourth Circuit is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347).

STATEMENT OF THE CASE

There are so many inaccuracies and omissions in the Petitioner's statement of the case (Petition, 2-3; Brief, 7-9) that a complete restatement of the facts is necessary.

In 1938 a plan of adjustment for the B. & O. (Ex. No. 7, R. folio 16 in Docket No. 625 of this Court, October Term, 1939, herein called the Plan) was formally submitted to all affected security holders for their acceptance or rejection. The Plan contemplated, among other things, an extension of the maturity of the Secured Notes of the B. & O. (hereinafter called the Notes) from August 1, 1939, to August 1, 1944, at a reduced rate of interest and provided that the "collateral securing the Notes will remain unchanged". It further provided that upon consummation a supplemental indenture would be executed in respect of the Notes giving effect to the changes contemplated by the Plan and that such supplemental indenture should provide that the extended Notes would continue to be secured by the same lien as at present.*

On July 28, 1939, Chapter XV was added to the Bankruptcy Act. It provided a new system for financial readjustment in a limited class of cases without reorganization in the usual manner; *i.e.*, a system for (a) judicial investigation of voluntary plans of financial readjustment proposed by interstate railroads, authorized by the Interstate Commerce Commission and accepted by specified percentages of each class of affected creditors and (b) if such a plan were found to be fair and conformable to the financial standards prescribed in Chapter XV, judicial action to make such plan binding on non-assenting minorities.

Nisi prius jurisdiction under Chapter XV was confided (Sections 710, 713 and 715) to a special court of three

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*The statement on page 11 of Petitioner's Brief that: "There was nothing in the Plan pertaining to this question," *i.e.*, the question involving the merits of the issue being presented to this Court, is inaccurate.

judges convened in the manner provided in Section 266 of the Judicial Code in the District Court having territorial jurisdiction over the principal office of the petitioning railroad. The B. & O. filed its petition under Chapter XV in the District Court of the United States for the District of Maryland, asking that a special court be convened and that the Plan be considered and confirmed. The Special Court was thereupon duly constituted pursuant to Section 266. It consisted of the Hon. John J. Parker, Senior Circuit Judge of the Fourth Circuit, the Hon. A. M. Dobie, then United States District Judge for the Western District of Virginia and now Circuit Judge of the Fourth Circuit, and the Hon. W. Calvin Chesnut, United States District Judge for the District of Maryland.

Various persons intervened in the proceedings, including the Trustee under the Indenture securing the Notes (hereinafter called the Trustee), the Reconstruction Finance Corporation, owner of $13,500,000 of Notes (34 F. Supp. 154, 163) and other owners of Notes. After notice, a public hearing was held on September 18-20, 1939, and an opinion approving the Plan was filed on October 9, 1939 (29 F. Supp. 608). The Decree (R. folio 200 in Docket No. 625 of this Court, October Term, 1939) was entered on November 8, 1939, approving and confirming the Plan and directing its effectuation in conformance therewith. Messrs. Abrams and Moss (now counsel for the Petitioner herein) who had appeared on behalf of other clients, not owners of Notes, petitioned this Court for a writ of certiorari for a review of the Decree (Docket No. 625, October Term, 1939). The petition was denied on January 29, 1940 (309 U. S. 654) and an application for a rehearing of the petition was denied on March 25, 1940 (309 U. S. 697).

Section 7.07 of the Decree,* which Section is set out in full in the Appendix hereto, provided in part that the Trustee

> "is hereby authorized and directed * * * to pay over to the B. & O. *all dividends* and interest which shall have been received by said Trustee from August 1, 1939, to the time of such payment to the B. & O. on the securities held by said Trustee under said Indenture *which would have been payable to the B. & O. under the provisions of said Indenture had there been no default by the B. & O. under said Indenture when said dividends* or interest *were so received* * * *."

Section 2 of Article Five of the Supplemental Indenture executed in consummation of the Plan with respect to the Notes contains a similar provision with respect to dividends and interest on the securities pledged under the Indenture securing the Notes (hereinafter called the Indenture).

Among the securities held by the Trustee under the Indenture are certain shares of stock of Reading Company and from time to time after August 1, 1939 (when default was made in the payment of the principal of the Notes), the Trustee had received dividends aggregating $1,694,000 on such stock. On May 16, 1940, the Trustee filed a petition with the Special Court requesting directions and instructions with regard to the disposition to be made, pursuant to the Decree, of dividends then held by the Trustee. The Trustee was in doubt as to whether such dividends, in the

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*The statement at page 11 of Petitioner's Brief that "there was nothing in the decree which affirmed the plan relating to this subject matter" is inaccurate.

language of Section 7.07 of the Decree, "would have been payable to the B. & O. under the provisions of said Indenture had there been no default by the B. & O. under said Indenture when said dividends * * * were so received," because Section 2 of Article Five of the Indenture provided that the Trustee should hold as additional security under the Indenture any "dividends paid out of surplus or earnings of Reading Company when the amount of the combined capital and surplus of Reading Company, *as shown by its books* is, or by reason of such payment would become, less than $225,000,000." 34 F. Supp. 154, 161.* The

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*Although the merits of the case are not before this Court, the Respondents are compelled to call the attention of the Court to the failure of the Petitioner to make any reference to the "as shown by its books" qualification in discussing the capital and surplus provision in the statements of the case on page 2 of the Petition and on page 7 of the Brief. It was this qualification that enabled the Special Court to say (34 F. Supp. 154, 162):

> "On the merits of the question submitted we have no difficulty in reaching the conclusion that the Trustee should, under existing circumstances, continue to pay over these Reading Co., dividends to the B. and O. * * *
>
> "But the controlling consideration in our view is that the very definite provision in the deed of trust affecting this matter requires the Trustee to base its action with respect to the disposition of the Reading Company dividends on the amount of the capital and surplus of the Reading Company *as shown by its books.* * * *"

Only once does the Petitioner refer to the qualification and that is only incidentally and ambiguously in the first complete sentence on page 8 of the Brief. The insinuation that the Petitioner attempts to create by his emphasis of the disparity between the book value and market value of the Reading stock in the light of the absence of a single clear reference to the "as shown by its books" qualification permeates the

applicable part of Section 2 of Article Five of the Indenture is set out in full in the Appendix hereto. There was no question that the amount of the capital and surplus of the Reading Company, "as shown by its books," had been in excess of $225,000,000 at all times in question. The petition of the Trustee, however, raised the question whether the Decree (which, in effect, incorporated by reference the above provision of the Indenture) required it to pay over such dividends to the B. & O. in view of the fact that the assets of the Reading Company included a majority of the outstanding stock of The Central Railroad Company of New Jersey, carried on the books of the Reading Company at its approximate cost of about $160 per share. The Central Railroad Company of New Jersey had filed a petition under Section 77 of the Bankruptcy Act in October, 1939, and the market value of its stock, when the Special Court handed down its opinion, was about $5 per share. 34 F. Supp. 154, 160-161.

Notice of a hearing to be held before the Special Court on July 16, 1940, for the purpose, among others, of considering the petition of the Trustee, was duly given by mailing a copy of the order of the Special Court providing for said hearing and of said petition to all counsel in the proceedings (including Messrs. Abrams and Moss), by mailing a notice of such hearing to each known holder of Notes (which the Petitioner purports to be) and by publication of such notice once a week for two successive weeks in The New York Times and in The Baltimore Sun (R. 7). Said notice "was duly served upon" the Petitioner (R. 4).

Petition and Brief. Because of this omission, the Petition and the Brief fail to disclose that the question before the Special Court was whether the words "as shown by its books" were to be given their normal meaning and effect.

After the hearing, the Special Court decided, as indicated by its opinion filed on August 3, 1940 (34 F. Supp. 154), (a) that it had jurisdiction to decide the question submitted by the Trustee and (b) that the dividends in question should be paid over to the B. & O. under Section 7.07 of the Decree. On August 3, 1940, the Special Court entered Order No. 22 (R. 2-3) directing such payment.

On August 31, 1940, the Petitioner filed a motion and petition with the Special Court requesting it to vacate its order on the grounds of (1) lack of jurisdiction and (2) that "no evidence, as far as the Petitioner knows, was presented to the Court upon which it could base its decision" (R. 4-5).* Although notice of the hearing on July 16, 1940, had been "duly served upon" the Petitioner (R. 4), the Petitioner was not present or represented at said hearing and made no objection at the time to the entry of the order, and its petition and motion did not show any reason for its failure to do so (R. 13).

On September 28, 1940, the Special Court by Order No. 23 (R. 12-13) overruled and denied said motion and petition. On October 10, 1940, the Petitioner appealed to the United States Circuit Court of Appeals for the Fourth Circuit from Orders Nos. 22 and 23 and from an earlier order not involved in the present Petition. On November 12, 1940, the Circuit Court granted a motion to docket and dismiss the appeal on the ground that exclusive jurisdiction to review the orders of the Special Court was vested in this Court by certiorari. The opinion is contained in the Record at pages 17-24.

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*Objection (2) was in addition to the jurisdictional objection which is the only one that the Petitioner refers to in his Statement of the Matter Involved on pages 2-3 of the Petition.

QUESTIONS PRESENTED

The only question of substance on which this Court is asked to pass is whether the Special Court correctly construed its Decree in connection with the disposition of the Reading dividends held by the Trustee. The Transcript of Record filed by the Petitioner does not contain the material necessary to enable this Court to pass on that question.

Accordingly, the Petition presents only the following incidental questions:

(1) Did Chapter XV of the Bankruptcy Act vest jurisdiction in the Special Court to interpret its Decree and to instruct the Trustee in the premises?

(2) Does Section 745 of Chapter XV of the Bankruptcy Act vest appellate jurisdiction over proceedings under said Chapter exclusively in this Court?

SUMMARY OF ARGUMENT

1. The Petition raises no question of public or general interest.

(a) The ultimate question at issue in these proceedings is the proper construction of a specific provision of a particular Trust Indenture, obviously involving no question of general interest.

(b) The questions of Federal procedure by which the Petitioner attempts to establish a case for certiorari are all questions involving the interpretation of the provisions of Chapter XV of the Bankruptcy Act. The interpretation of the provisions of

Chapter XV presents no question of public or general interest, since no new proceedings can be instituted under Chapter XV, and all but one of the proceedings instituted thereunder have terminated.

2. The decisions of the Special Court and the Circuit Court of Appeals now sought to be reviewed are not in conflict with decisions of this Court or of other Circuit Courts of Appeal.

3. The Special Court correctly decided that it had jurisdiction under Chapter XV to determine the disposition of the dividends held by the Trustee.

4. The Petitioner has failed to certify a record sufficient to enable this Court to pass on the construction by the Special Court of its Decree.

5. The Circuit Court of Appeals correctly decided that Chapter XV vested in this Court exclusive appellate jurisdiction over proceedings under said Chapter.

ARGUMENT

1. THE PETITION RAISES NO QUESTION OF PUBLIC OR GENERAL INTEREST.

The ultimate question in issue in this case is the construction of a specific provision of a particular Indenture which was incorporated by reference in the Decree of the Special Court, and the sole question involved in such construction is whether the words "as shown by its books" in the Indenture are to be given their ordinary and usual meaning or are to be qualified. Certainly this Court will

not concern itself with questions of this type, involving only the construction of a particular instrument and having no general application whatsoever.

Counsel for the Petitioner, realizing that that question could not concern this Court, has attempted to bolster up his case by arguing that the decisions of the Special Court and the Circuit Court of Appeals which he asks this Court to review involved important questions of Federal procedure. It is clear, however, that, even if these procedural questions were of importance in themselves, they cannot be of any public or general interest because they all arise under Chapter XV of the Bankruptcy Act. Chapter XV of the Bankruptcy Act is no longer an effective statute and the construction of its provisions is no longer of any public or general interest.

Section 755 of Chapter XV provides that "the jurisdiction conferred upon any court by this chapter shall not be exercised by such court after July 31, 1940, except in respect of any proceedings initiated by filing a petition under section 710 hereof on or before July 31, 1940." Only six petitions under Chapter XV were filed on or before July 31, 1940. Final decrees confirming plans of adjustment have been entered in all these proceedings, and the statutory periods for applying for a writ of certiorari from such decrees have expired. Counsel for Respondents are advised by counsel in said proceedings that all but one of said proceedings are considered terminated. In the one remaining proceeding (that involving the Peoria and Eastern Railway Company), a petition for certiorari to review the decree was denied by this Court in November, 1940. Accordingly, the interpretation of the provisions of Chapter XV cannot now be of any public or general interest.

2. THE DECISIONS OF THE SPECIAL COURT AND THE CIRCUIT COURT OF APPEALS NOW SOUGHT TO BE REVIEWED ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUIT COURTS OF APPEAL.

Petitioner argues that the denial of Petitioner's motion to vacate Order No. 22 was dependent upon an application of Rule 59(b) of the Federal Rules of Civil Procedure, and that, accordingly, such denial was inconsistent with certain decisions to the effect that Rule 59(b) is not applicable in bankruptcy cases. It is true that the Special Court referred to Rule 59(b) in Order No. 23 denying the motion to vacate but it referred to that Rule only incidentally. The complete decretal portion of Order No. 23 (R. 12-13) is as follows:

> "It is thereupon now Ordered this 28th day of September, 1940 that said motion and petition filed August 31, 1940, be and the same is hereby overruled and denied because not timely filed (Federal Rules of Civil Procedure, Rule 59b), and because an examination of the petition and brief filed in support thereof shows that no substantial matter is therein presented, which has not heretofore been fully considered by the court."

The motion and petition were denied (1) on the merits and (2) because not timely filed and it is only with reference to the latter ground that the Special Court incidentally referred to Rule 59(b) and then only, so far as appears from the wording of Order No. 23, by way of analogy. It is clear that Order No. 23 is not a decision, or even a dictum, that Rule 59(b) is applicable in bankruptcy cases. Even if

the reference to Rule 59(b) should be considered one of the bases for the decision, it is at most an expression of opinion that Rule 59(b) is applicable in cases under Chapter XV. As pointed out above, such a decision could be of no public or general interest.

Petitioner also claims that the decision of the Circuit Court of Appeals dismissing the appeal to that Court on the ground that exclusive appellate jurisdiction is vested in this Court under Chapter XV is in conflict with the decisions of this Court in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Company,* 292 U. S. 386 (1933) and *Wilentz* v. *Sovereign Camp,* 306 U. S. 573 (1939) and with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Illinois Bell Telephone Co.* v. *Slattery,* 98 F. (2d) 930 and 102 F. (2d) 58.

There is no basis for this claim. In the *Oklahoma Natural Gas* case and the *Wilentz* case the alleged appellate jurisdiction of this Court was based on Section 266 of the Judicial Code, providing for a direct appeal to this Court from a final decree granting or denying a permanent injunction in a suit to restrain a state officer from enforcing or executing a state statute or an order of a state commission, on the ground of the unconstitutionality of such statute or order. This Court decided that the suits in question did not comply with the provisions of Section 266 because there was no basis for relief of any sort against the state officers, joined as defendants, and that accordingly the provision of Section 266, authorizing a direct appeal to this Court, was inapplicable.

The *Illinois Bell Telephone* cases, decided by the Circuit Court of Appeals for the Seventh Circuit, also arose in proceedings originally instituted before a three-judge court

pursuant to Section 266. In those cases, however, the original suit seeking to enjoin action by the state officers had been finally determined, after appeal to this Court, and the orders under consideration involved only the disposition of certain moneys collected by the Telephone Company on rates which had been found to be excessive. The Circuit Court of Appeals properly held that the exclusive appellate jurisdiction vested in this Court by Section 266 was limited by the terms of Section 266 to suits seeking to enjoin state officers, and that the provisions of Section 266 as to appellate jurisdiction were not applicable to subsequent orders of the three-judge court not involving questions of injunction against state officers.

Petitioner seeks to argue that these cases were decided on the ground that the three-judge court did not have jurisdiction under Section 266 to enter the orders appealed from, and that for that reason appellate jurisdiction was not vested in this Court. But it is clear that the question decided by this Court and by the Circuit Court of Appeals for the Seventh Circuit in those cases was not whether the Special Court had jurisdiction, but whether the order from which the appeals were taken was the kind of an order over which, under the provisions of Section 266, this Court had exclusive appellate jurisdiction. These cases are further discussed under Point 5 below.

It is clear that there is nothing in the decisions sought to be reviewed which is in conflict with any decision of this Court or with any decision of any other Circuit Court of Appeals referred to by the Petitioner.

3. THE SPECIAL COURT CORRECTLY DECIDED THAT IT HAD JURISDICTION UNDER CHAPTER XV TO DETERMINE THE DISPOSITION OF THE DIVIDENDS HELD BY THE TRUSTEE.

The Petitioner is in error in his statement (Brief, 13) that it was not necessary to construe the terms of the Decree. As pointed out in the foregoing statement of facts, Section 7.07 of the Decree, directing the Trustee to pay over "dividends which would have been payable to the B. & O. under the provisions of said Indenture", incorporated by reference the restrictions in the Indenture. Without a construction of the Decree in this respect, the Trustee would have acted at peril. If it refused to pay, it might be in contempt for violating the Decree. If it paid, without a construction of the Decree and of the provisions of the Indenture incorporated therein by reference, it might be liable to Noteholders.

The Special Court had the inherent right, which is thoroughly established, of a court to construe its own decrees and orders.*

Furthermore, Section 715 of Chapter XV specifically provides that a three-judge court convened for proceedings under Chapter XV shall, during the pendency of those proceedings, "have exclusive jurisdiction of the petitioner and

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*_Cheang-Kee_ v. _United States_, 70 U. S. 320 (1865); _Bronson_ v. _Schulten_, 104 U. S. 410 (1881); _S. S. Kresge Co._ v. _Winget Kickernick Co._, 102 F. (2d) 740 (C. C. A. 8th, 1939); _National Biscuit Co._ v. _Kellogg_ Co., 96 F. (2d) 873 (C. C. A. 3rd, 1938), reversed on other grounds 305 U. S. 111; _Stepp_ v. _McAdams_, 97 F. (2d) 874 (C. C. A. 9th, 1938); _United States_ v. _E. I. DuPont de Nemours & Co._, 273 Fed. 869 (D. C., Del., 1921).

of its property wherever located to the extent which may be necessary to protect the same against any action which might be inconsistent with said plan of adjustment or might interfere with the effective execution of said plan if approved by the court, or otherwise inconsistent with or contrary to the purposes and provisions of this chapter." The Plan provided that "the collateral securing the Notes will remain unchanged" and that the supplemental indenture to be executed upon consummation of the Plan "will, among other things, provide that the extended Bonds or Notes will continue to be secured by the same lien as at present." As stated by the Special Court in its opinion (34 F. Supp. 154, 160-1), the dividends in question aggregated $1,694,000, which was nearly 10% of the annual fixed interest of the B. & O. under the Plan and, accordingly, failure of the Trustee to pay over the Reading dividends to the B. & O. might interfere with the effective execution of the Plan, within the meaning of Section 715 of Chapter XV.

The provisions of Section 715 of Chapter XV, quoted above, are a complete answer to Petitioner's argument that the Special Court had no jurisdiction over the collateral in the possession of the Trustee. In *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935), this Court held that under Section 77 of the Bankruptcy Act the district court had jurisdiction over assets of the debtor pledged as collateral, whether located within or without the district. Section 77 provides that "the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located." The language is similar to

that of Section 715 of Chapter XV and has been construed by this Court to confer jurisdiction over assets of the debtor pledged as collateral. There is no limitation on the jurisdiction so conferred by Section 715, except that jurisdiction is granted only to the extent which may be necessary to protect such assets against action which might be inconsistent with the plan or might interfere with the effective execution of the plan. As pointed out above, the Special Court correctly held that failure to pay over to the B. & O. the dividends in question might interfere with the effective execution of the Plan. The cases cited by the Petitioner were decided under sections of the Bankruptcy Act which do not confer on the Court jurisdiction similar to that conferred by Section 77 and Chapter XV, and are obviously not in point.

Petitioner's argument (Brief, 10) that the Special Court had no jurisdiction of the subject-matter presented by the Trustee's petition because the construction by the Special Court of the duties of the Trustee with respect to the Reading dividends was never submitted to the Interstate Commerce Commission or to the Noteholders for approval or assent is without merit. This was not a question of a change in the terms of securities, requiring approval by the Commission and the assent of a specified percentage of security holders. It was a question of law as to the meaning of a provision of the Indenture which became incorporated by reference in the Decree. It is the same as if the Special Court had been asked to construe an ambiguous provision in the Plan itself. The provision would have to be assented to by security holders as part of the Plan, but the meaning of the provision would be a question of law for determination by the Special Court.

Petitioner's argument that jurisdiction to construe the terms of a Trust Indenture belongs exclusively to equity courts, not to a statutory court, overlooks the fact that Section 713 of Chapter XV specifically gives the Special Court constituted under Chapter XV "all the powers of a district court sitting in equity." Moreover, as stated by this Court in *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co., supra,* at page 675, courts of bankruptcy "are essentially courts of equity, and their proceedings inherently proceedings in equity."

4. THE PETITIONER HAS FAILED TO CERTIFY A RECORD SUFFICIENT TO ENABLE THIS COURT TO PASS ON THE CONSTRUCTION BY THE SPECIAL COURT OF ITS DECREE.

There is nothing in the Transcript of Record filed by the Petitioner in this case which gives this Court the information necessary to enable it to determine whether or not the Special Court correctly construed its Decree in directing payment to the B. & O. of the Reading dividends held by the Trustee. The Transcript does not contain the Decree or even that portion of it dealing with the disposition of these dividends. It does not contain the Indenture or any part thereof. It does not contain the Stipulation of Facts filed with the Special Court in connection with the petition of the Trustee, nor any of the testimony taken at the hearing before the Special Court.

Because of the Petitioner's failure to include this essential material, his Petition is inadequate in so far as it asks certiorari in respect of Order No. 23 of the Special Court.

Respondents had no opportunity to cure or to attempt to cure the inadequacy in the Transcript of Record prior

to the time it was filed. On or about November 23, 1940, Messrs. Hunton, Williams, Anderson, Gay & Moore, of counsel for Respondents, received an unsigned "Notice", referring only to the decision of the Circuit Court in Case No. 4718 and reciting that a designation of record for certiorari was therewith enclosed. In fact, there was no such enclosure. Mr. George D. Gibson, of said firm, wrote to counsel for the Petitioner on November 23, 1940, stating that the designation of record was not enclosed. A reply of counsel for the Petitioner under date of November 26, 1940 was received, containing the following paragraph:

> "This is to acknowledge your letter of November 23rd wherein you state that the copy of the Designation of the Record was not found in the letter. There must certainly have been an oversight, but for your information I desire to state that the Designation merely called for the complete record in Case Number 4718. We have already forwarded the Petition for Certiorari to be filed with the Clerk of the United States Supreme Court and as soon as we get word that it was docketed we will mail you a copy of the record and petition as required by the rules of court."

Neither in the original "Notice" nor in the letter of November 26, 1940 was there any intimation that the Petitioner was asking for certiorari in respect of Order No. 23. Accordingly, Respondents had no opportunity to file any counter-designation to include in the Record the material essential to enable this Court to pass on the merits of the question decided by the Special Court by Orders Nos. 22 and 23.

In view of this incomplete Record, and the fact that Petitioner does not discuss, except by indirection, the correctness of the Special Court's decision on the merits, we think it inappropriate to discuss that question here. However, we repeat that the question thus omitted by the Petitioner from his Transcript of Record and from his Brief is the only question of substance involved in these proceedings.

5. THE CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT CHAPTER XV VESTED IN THIS COURT EXCLUSIVE APPELLATE JURISDICTION OVER PROCEEDINGS UNDER SAID CHAPTER.

Section 745 of Chapter XV provides as follows:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the provisions of the Federal Judicial Code."

In form, of course, this language is permissive. But that was obviously the only proper form of expression because the purpose of Congress was only to confer jurisdiction upon this Court, the exercise of such jurisdiction in any particular case being dependent upon the concurrence of two further conditions, that is (1) proper application therefor and (2) election by this Court to proceed. Clearly, however, when permissive jurisdiction by certiorari directly from this Court is provided in a statute dealing in full with a specific and limited subject matter, as here, that provision is exclusive, and a review of the matters so provided for may not be had elsewhere.

Section 266 of the Judicial Code provides that a direct appeal to this Court "may be taken" from a final decree in proceedings to enjoin state officers from enforcing state statutes because of asserted unconstitutionality and it is held that the mode of review so provided is exclusive and no appeal lies to a circuit court of appeals. *Jackson* v. *Cravens,* 238 Fed. 117 (C. C. A. 5th, 1916) and *Brucker* v. *Fisher,* 49 F. (2d) 759 (C. C. A. 6th, 1931). Of course, a suit must be within the statute to make the direct review provision applicable. This Court has pointed out in *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 581 (1939), that if a suit is not one to restrain the action of state officers, "their presence in the suit generates no interest which it is the purpose of § 266 to protect and must be regarded as colorable only for the purpose of securing the advantages of proceeding before a court of three judges, as was the presence of the state officers in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra* [292 U. S. 386], where it was held that there was no appeal under § 266." Since there was "no substantial basis for relief by injunction restraining the action of state officers" in the *Wilentz* or *Oklahoma Gas* cases, appeal to this Court did not lie.

Similarly, the orders appealed from in *Illinois Bell Telephone Co.* v. *Slattery,* 98 F. (2d) 930 and 102 F. (2d) 58 were not final decrees "granting or denying a permanent injunction in a suit to restrain a state officer" and hence were not orders reviewable directly by this Court under Section 266.

The language of Section 745 of Chapter XV differs materially from the language of Section 266. It provides that *any* final order or decree of the Special Court may be reviewed by this Court. It is therefore clear that the deci-

sions under Section 266 referred to by the Petitioner and discussed above are not in point on the question of appellate jurisdiction under Chapter XV.

It has been the consistent policy of Congress to rest appellate jurisdiction in this Court under statutes providing for three-judge courts,* and it has been universally recognized that the appellate jurisdiction of this Court under such statutes is and was intended to be exclusive. A contrary result under Chapter XV would be a reversal of a long-established policy. Obviously, the reason for such exclusive appellate jurisdiction is the public interest in expediting the disposition of the proceedings to which such jurisdiction applies, and that reason is particularly applicable to proceedings under Chapter XV, which was intended to provide a speedy method for readjustment of railroad finances.

Another reason why the appellate jurisdiction of this Court is exclusive in such cases was well stated by Mr. Abrams, counsel for the Petitioner herein, in a brief filed by him with this Court in *Berman* v. *Illinois Bell Telephone Co. et al.,* Docket No. 1010, October Term, 1937, being one of the appeals to this Court in the *Illinois Bell Telephone Company* cases referred to above. In that brief Mr. Abrams said at page 24:

> "In further argument supporting a direct appeal, it is worthy of note that one of the reasons for permitting such an appeal to the Supreme Court is that at least one Circuit Court judge of the specially

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***See Section 380 of Title 28, U. S. C.; Section 380a of Title 28, U. S. C.; Sections 47 and 47a of Title 28, U. S. C.; Sections 28 and 29 of Title 15, U. S. C.; Sections 44 and 45 of Title 49, U. S. C.**

> organized three judge court has already passed upon the question involved. There would be little sense in giving an appellate review of a decision of such a court to the Circuit Court of Appeals. * * *"

In this case two of the three judges of the Special Court are Circuit Court Judges, one being the Senior Circuit Judge.

CONCLUSION

It is respectfully submitted that the Petition for writs of certiorari should be denied.

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